Supreme Court, U. S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WALTER W. HOWELL,
Petitioner,

v.

CITY OF BIRMINGHAM,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALABAMA COURT OF
CRIMINAL APPEALS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether, in obscenity cases, a trial by jury is required in the first instance on the issue of contemporary community standards: trial by jury after appeal to Circuit Court from bench conviction in Municipal Court does not satisfy constitutional requirements.

II. Whether the enforcement of City of Birmingham Ordinance 16-18, as amended, against Petitioner and others of his class who own, operate, or are employed by adult bookstores or adult theatres in the City of Birmingham, while permitting owners, operators, and employees of other business establishments in the city, for whatever reason or justification, to sell publications or show movies which describe or depict sexual conduct also in presumptive violation of said ordinance, works out unequally and invidiously towards Petitioner and others of his class and constitutes discrimination violative of the Equal Protection Clause of the Fourteenth Amendment.

III. Whether the Petitioner is entitled to pursue his right to a trial by jury without fear that, if found guilty by said jury, the court will impose a jail sentence or a more severe jail sentence upon him than he would receive if he plea-bargained his case or tried it before the court without a jury.

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PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Alabama Court of Criminal Appeals entered in the above case on January 22, 1980.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals concerning Walter W. Howell is appended hereto as Appendix A.

Walter W. Howell v. City of Birmingham, 383 So.2d 567 [Ala. Crim. App. 1980] (A.1-A.5). The denial of Walter W. Howell's Petition for Writ of Certiorari by the Supreme Court of Alabama is attached hereto as Appendix B (*Walter W. Howell v. City of Birmingham*, 383 So.2d 570, [Ala. 1980] (A. 6).

JURISDICTION

The Judgment of the Alabama Court of Criminal Appeals was entered on January 22, 1980 (Appendix A, A.1-A.5). The request for Rehearing was denied by the Alabama Court of Criminal Appeals on February 26, 1980 (Appendix A). The Supreme Court of Alabama denied certiorari for Petitioner on May 23, 1980 (Appendix B). This Court's jurisdiction is invoked under Title 28 U.S.C. §1257(3) (Appendix C, A.7-12).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth and Fourteenth Amendments of the United States Constitution, the pertinent provisions of Section 16-16 and 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended, Alabama Code §§12-14-6 (1975); and Title 28 U.S.C. §1257(3), appear in Appendix C. (A.7-A.10). (U.S. Const. Amends. I, VI, XIV; Alabama Code §§12-14-6; Section 16-16 of the General Code of the City of Birmingham, 1964, as amended; Section 16-18 of the General Code of the City of Birmingham, 1964, as amended.)

STATEMENT

1. The Petitioner was charged with violation of the obscenity ordinance of the City of Birmingham. The complaint against Walter W. Howell alleged that Petitioner "... knowingly and unlawfully exhibited at the aforesaid location to R. A. Bowden an obscene motion picture, film or matter entitled, to-wit: "Honeypie," which portrayed the following sexual conduct: actual act or acts of sexual intercourse, fellatio,

cunnilingus, contrary to and in violation of Section 16-18 of the General Code of the City of Birmingham, Alabama, 1964, as amended."

On May 11, 1978, the Petitioner was tried in the Municipal Court of the City of Birmingham on the complaint filed against him. Petitioner demanded a trial by jury, which was refused. He was tried without a jury, and was convicted. Petitioner was fined $250.00 and sentenced to 30 days in jail. Petitioner appealed to the Circuit Court of Jefferson County, Tenth Judicial Circuit of Alabama. On September 30, 1978, Petitioner was tried before a jury on the complaint before the Honorable William H. Cole. After a two day jury trial, Petitioner was found guilty. Petitioner was sentenced to pay a fine of $500.00 and perform hard labor for the City of Birmingham for 180 days as additional punishment. The fine was assessed by a jury and the hard labor sentence was added by the Court.

2. A Motion to Quash was filed and raised constitutional questions as to the ordinance under which Petitioner was tried, both as written and as applied to him.

The Motion to Quash specifically raised the issue of arbitrary and intentional discriminatory enforcement of the ordinance (obscenity) by the city. The city purposefully and intentionally enforces its obscenity ordinance against one class of employees, those employed in adult bookstores and adult theatres, while permitting another class of employees, those employed in non-adult bookstores or theatres (general patronage businesses such as convenience stores, drug stores, newsstands, bookstores and family theatres), to sell books and magazines or exhibit films which describe or depict sexual conduct in presumptive violation of the city's obscenity ordinance, without feat of prosecution. The Motion further questioned the constitutionality of the city's ordinance for its failure to provide a jury determination of contemporary community standards in obscenity prosecutions. Also whether in obscenity prosecutions a trial by jury is required in the first instance, a trial by jury after appeal to the Circuit Court being insufficient to satisfy the requirements of the United States Constitution.

The Motion to Quash was overruled. The Petitioner was tried before a jury and found guilty as charged in the complaint. The sentence imposed by the jury and the Court was suspended pending appeal.

4. The Petitioner appealed his conviction to the Alabama Court of Criminal Appeals, raising issues presented in this Petition. The Court of Criminal Appeals affirmed Petitioner's conviction with opinion on January 22, 1980, and an Application for Rehearing was timely filed and denied without opinion on February 26, 1980, (Appendix A, A. 1-A.5; Appendix C, A. 7).

5. A Petition for Writ of Certiorari was timely filed by Petitioner with the Supreme Court of Alabama requesting that court to review the issues raised in this Petition. The Petition was denied without opinion on May 23, 1980, (Appendix B, A. 6).

6. The Tomkat Theatre is an all adult theatre, licensed by the City of Birmingham (T. 94, 63). The appellant, Walter W. Howell, was employed by the Tomkat Theatre to sell tickets and run the projectors in April, 1978 (T. 92). Mr. Howell works 48 hours a week at the theatre for a fixed sum, which is union scale for a projectionist (T. 94, 109). Mr. Howell has been a projectionist for thirty-seven years (T. 93). He does not own any part of Tomkat Theatre (T. 93) and has no control over what is shown in the theatre (T. 92, 93, 101). He simply puts the film on and takes the film off (T. 101). The exterior of the Tomkat Theatre is such that one would be forewarned that it is an all adult theatre and no one under nineteen would be admitted (T. 46, 57, 94, 95). Males and females patronize the theatre with the average age group being between 30 and 55 years of age (T. 96).

Officer Roy A. Bowden was a member of the vice squad of the Police Department of the City of Birmingham and had been for six months prior to April 12, 1978 (T. 45). Officer Bowden went to the Tomkat Theatre as part of his assignment with the Vice Squad of the Birmingham Police Department (T. 47). Officer Bowden had received no complaint from any citizen

concerning the movie (T. 47), but went there on instructions from his Captain (T. 93). Bowden went into the theatre, purchased a ticket with money provided by the City of Birmingham, sat down along with eighty to a hundred other people and saw the movie "Honeypie" (T. 22, 23, 47, 95). Mr. Howell did not solicit Officer Bowden nor anyone else to come into the theatre (T. 47).

While Officer Bowden stated he was familiar with the criteria that must be applied in order to determine that a first amendment protected material may be obscene, Bowden evaluated the movie on community standards of the City of Birmingham, when the test of community standards is in fact the entire State of Alabama (T. 74). Officer Bowden was not aware if any adult book store or adult theatres operated in Montgomery, Mobile, Huntsville, Anniston, Gadsden or Selma prior to his arresting the appellant (T. 60-61). Officer Bowden had never talked with any minister, educator or any other citizen in Birmingham other than other members of the Vice Squad in order to determine community standards before seeking appellant's arrest (T. 61-62). The Court refused to allow Officer Bowden to answer whether he had talked to any doctors, blue collar workers, white collar workers or women for the purpose of finding out what the community standards are for films involving sexual conduct (T. 62-63, 78-79). Officer Bowden was not aware of any theatres, adult or non-adult, which do not show obscene films (T. 85).

On April 13, 1978 Officer Bowden went to the office of Judge Peter Hall, a Municipal Judge, to obtain a search warrant (T. 27, 28, 71). Officer Bowden had already dictated the language for the affidavit and the search warrant, had them typed up and presented them to Judge Hall for his signature (T. 69-71). Judge Hall did not view the film before issuing the search warrant, nor did Judge Hall view the film prior to issuing the arrest warrant (T. 80-81). Officer Bowden was with Judge Hall for about 20 minutes. The Judge asked Officer Bowden to clarify the last scene of the movie. No discussion concerning any other scene in the film took place (T. 71-73).

Neither the Petitioner nor his attorney was present when the search warrant or arrest warrant was issued. There was no adversary hearing concerning the obscenity of the film prior to the issuance of the arrest warrant. Mr. Howell was tried before a Municipal Court Judge without a jury, was found guilty and fined $250.00 with a 30 day jail sentence (T. 130). Mr. Howell appealed his conviction to the Circuit Court where he was tried before a jury which found him guilty and fined him $500.00 (T. 128). The Circuit Court Judge then added an additional jail sentence of 180 days (T. 131).

Aside from the Tomkat Theatre, there are five other theatres which show adult movies primarily for their sexual content (T. 52). In addition, at least five theatres, generally termed as family theatres, have shown movies x-rated for their sexual content from time to time (T. 52). There are seven adult book stores (T. 57) and hundreds of 7-11 stores, drug stores, airport newsstands and other newsstands which sell books and magazines containing various types of sexual conduct (T. 92). The stories in magazines such as "Hustler" and "Playboy" describe the same sexual conduct as seen in "Honeypie" including the sexual intercourse, cunnilingus, fellatio and bondage scenes (T. 89). The pictures shown in these magazines sold in non-adult book stores show nudes, the head of a man between the legs of a female and the genitals of both male and female clearly exposed (T. 89).

REASONS FOR GRANTING THE WRIT

1. Section 12-14-6, Code of Alabama 1975, provides that "All cases in municipal courts shall be tried by a judge without a jury." Alabama case law has consistently held that the constitutional right of trial by jury does not extend to trials under city ordinances. *Birmingham v. Evans*, 53 Ala. App. 358; 300 So.2d 396 (1974); *City of Birmingham v. Williams*, 229 Ala. 101; 155 So.877; *Donahey v. City of Montgomery*, 43 Ala. App. 20, 178 So.2d 832. Further, this Court, in *Duncan v. Louisiana*, 391 U.S. 145, at 159, reaffirmed a long established view that "petty offenses" may be tried without a jury, and in *Baldwin v. New York*, 399 U.S. 66, 69 (1970), the plurality opinion of Mr. Justice White concluded that the severity of the

sentence would determine whether an offense will be deemed "petty" for purposes of the right to trial by jury. Petitioner argues and urges that an obscenity prosecution is and must be an exception to this rule.

On June 21, 1973, in *Miller v. California*, 413 U.S. 15, 23, 25, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419, this Court reformulated the constitutional test for determining obscenity and said:

> " . . . We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes desigr d to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas, supra*, 390 U.S. (676), at 682, 685, 88 S.Ct. (1298), at 1302, 1305 (20 L.Ed.2d 225). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value.
>
> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would fine that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, 408 U.S., at 230, 92 S.Ct., at 2246, quoting *Roth v. United States, supra*, 354 U.S. at 489 77 S.Ct., at 1311; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable

> state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value . . . . If a state law that regulates obscene material is thus limited, as written are construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.
>
> . . .
>
> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. . . . For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. *In resolving the inevitable sensitive questions of fact and law, we must continue to rely on the jury system.*" (Emphasis added).

The application of the "contemporary community standards" guideline was explained by Mr. Justice Rehnquist in *Hamling v. United States*, 418 U.S. 87 (1974), at page 105:

> "*Miller* rejected the view that the First and Fourteenth Amendments require that the proscription of obscenity be based on uniform nationwide standards of what is obscene, describing such standards as 'hypothetical and unascertainable,' 413 U.S., at 31, 93

> S.Ct., at 2619. But in so doing the Court did not require as a constitutional matter the substitution of some smaller geographical area into the same sort of formula; the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' 413 U.S., at 24, 93 S.Ct., at 2615. When this approach is coupled with the reaffirmation in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, 93S.Ct. 2628, 2634, 37 L.Ed.2d 446 (1973) of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from *Miller* becomes clear. *A juror* is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes . . . in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case."

Miller states that the question of what appeals to the "prurient interest'. and what is "patently offensive" under the obscenity test which it formulated are "essential questions of fact." *Jenkins v. Georgia*, 418 U.S. 153 (1974).

This Court, in *Smith v. United States*, 97 S. Ct. 1756 (1977) has held that the issues of "appeal to prurient interest" and "patent offensiveness" are fact questions for the jury, to be judged in light of the jurors' understanding of contemporary community standards. The Court stated at page 1763:

> "The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact *for the jury to resolve*. The *Miller* opinion indicates

> that patent offensiveness is to be treated in the same way. See *Hamling v. United States*, 418 U.S. at 104-105." (Emphasis added)

Therefore *Miller*, as explained in *Hamling*, means that in determining obscenity under the First and Fourteenth Amendments, a jury determination of contemporary community standards is constitutionally required. *McNary v. Carlton*, 517 S.W.2d 343 (Mo. 1975); *City of Kansas City v. Darby*, 544 S.W.2d 529 (Mo. 1977), appeal dismissed, 21 Crim.L.Rep. (BNA) 4065; *State v. Luck*, 353 So.2d 225 (La.1977).

In *City of Kansas City v. Darby, supra*, the Missouri Supreme Court held that the denial of a jury trial on the issue of community standards in an obscenity prosecution in municipal court was unconstitutional, notwithstanding the fact that the municipal court was barred by ordinance from providing a trial by jury or that a jury was available on appeal to the circuit court. The City of Kansas City appealed this case to the United State Supreme Court where, on May 31, 1977, the appeal was dismissed. The *Darby* appeal raised the question "Does the First and Fourteenth Amendments require that questions of obscenity be decided by a jury?" See 21 Crim.L.Rep. 4048 (1977). This Court's denial of the City of Kansas City's appeal strongly suggests that a jury of one's peers must determine questions of obscenity.

The Supreme Court of Minnesota on August 31, 1979, agreed that a criminal obscenity charge must be tried to a jury. *City of Duluth v. Sarette*, 26 Crim.L.Re. (BNA) 2039 (Minn. 1979). The Minnesota Court stated that:

> "The need for a jury determination is particularly compelling in cases such as this where no expert testimony or extrinsic evidence other than the allegedly obscene material itself is admitted at trial. When the issue is tried to the court, a judge is placed in the unenviable position of determining contemporary community standards, either upon impressions

> formed from his contacts with residents or upon his individual opinion of the locality's values. Neither of these alternatives is wholly consistent with the test enunciated in *Miller v. California*, 413 U.S. 15 (1973). In contrast, a jury represents a cross section of the community and is better equipped to make the important and sensitive determination of community standards required in an obscenity prosecution. . . . [w]e believe that the contemporary-community-standards test can best be applied by a jury and therefore hold, under the supervisory powers of this court, that a criminal obscenity charge must be tried to a jury." *City of Deluth v. Sarette, supra*, at page 2039.

In *Holderfield v. City of Birmingham*, Ala.Crim.App. 380 So.2d 990 (1979), the Alabama Court of Criminal Appeals rejected the Defendant's contention that a jury trial should be required in all criminal obscenity prosecutions. A petition for writ of certiorari of the Alabama Court's decision in *Holderfield* has been docketed in this Court. (Docket No. 79-1918; June 5, 1980). In *Holderfield*, the Alabama Court seized upon the language of the Supreme Court of Minnesota in *Sarette* "that a jury trial is not constitutionally mandated under the circumstances." It chose however, to completely disregard *Darby* and the fact that that case was appealed to this Court by the City of Kansas City on the very issue raised by this Petitioner and the appeal was denied. It also chose to ignore the fact that the Minnesota Court also held"that a criminal obscenity charge must be tried to a jury." The Alabama Court further ignored the suggestions made and the directions set in cases decided by this Court (*Miller, Hamling, Jenkins, Smith*) as authority for requiring a jury trial in criminal obscenity prosecutions.

In this respect, Alabama stands alone as far as this Petitioner can determine. Most states which prosecute obscenity violations do so in its state courts, where a jury trial is available. In the few states where obscenity prosecutions are begun in a municipal or district court where a jury trial is

unavailable, and the question has been presented to its highest court, except for Alabama, the courts have uniformly held that only a jury can determine community standards – only a jury can determine whether or not the material, applying contemporary community standards, appeals to the prurient interest – only a jury can determine whether or not, again applying contemporary community standards, the sexual conduct described or depicted in the material is patently offensive.

The Alabama Court, without explanation, other than to uphold the constitutionality of the Alabama statute requiring all cases in municipal courts shall be tried without a jury, ruled that "the defendant was not denied due process of law." The Alabama statute need not be unconstitutional for Petitioner to be denied due process. Obscenity prosecutions are a special breed–made so because of this Court's reasoning in *Miller v. California, supra*, and *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), as explained in *Hamling v. U.S., supra. Miller* required an understanding of the average person, applying contemporary community standards. *Paris* did not require affirmative proof of the obscenity of the materials. *Hamling* explained that the import of *Miller* and *Paris* was clear–that "*a juror* is entitled to draw on his own knowledge of the view of the average person in the community or vicinage from which he comes for making the required determination. . ." at page 2615.

Duncan v. Louisiana, supra, cited by the Alabama Court in *Holderfield, supra*, for the proposition that a jury trial is not mandated for a court where the maximum fine is $500.00 and the maximum jail sentence is six months, was decided in 1968, long before this Court established its present evidentiary rules for criminal obscenity prosecutions. In view of *Miller* and *Hamling* and *Smith*, an exception to *Duncan* would lie in criminal obscenity prosecution where "the issue of contemporary community standards for appeal to the prurient interest and patent offensiveness. . .[are] questions for the jury to decide in its traditional role as fact-finder." *Smith, supra*, at p. 1767.

A constitutionally acceptable determination of obscenity cannot be made in the Municipal Court of Birmingham because no jury is available. This constitutional deficiency cannot be cured by the process of allowing an appeal to the Circuit Court where a jury is available. *Callan v. Wilson*, 127 U.S. 540 (1888). In *Callan*, this Court said at page 557:

> " . . . to accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."

Recognizing that in Alabama under ordinary circumstances, a trial by jury is not necessary for violation of a city ordinance, *Birmingham v. Evans, supra*, an exception exists in determining whether or not material is obscene. If a determination is made, based on contemporary community standards, that the material is not obscene, then it will be protected by the First Amendment. Only a jury can make that determination by applying contemporary community standards.

A person is entitled to freedom of expression, in areas of alleged obscenity, until a jury of his peers declares otherwise. It is not constitutionally permissible to allow a municipal judge to restrict freedom of expression prior to the time a jury determines whether or not a movie is obscene.

This Court let stand, by dismissing an appeal filed by the City of Kansas City, a Missouri Supreme Court decision that *"in obscenity cases only*, a trial by jury is required in the first instance and a trial by jury after appeal to Circuit Court 'does not satisfy the requirements of the Constitution.' (127 U.S. at 557, 8th S.Ct. at 1307)" *City of Kansas City v. Darby, supra. Martin v. Municipal Court of Kansas City*, 546 S.W.2d 7 (Mo. 1977). *City of Duluth v. Sarette, supra* 2039. As a result, in Missouri criminal obscenity prosecutions are tried by a jury in the first instance. The Alabama Court, with exactly the same set of facts and court situation, concluded differently. Consequently, in Alabama the essential determination of

"contemporary community standards" need not be made by a jury in the first instance. The two states are in conflict on the same point of law, a point of law essential to the determination of whether or not the material in question is obscene. By granting certiorari, this Court can review this issue and set the same procedural process for all states and for all offenders in the criminal enforcement of obscenity laws.

2. The Petitioner was arrested, tried, and convicted for exhibiting a film in alleged violation of City of Birmingham Ordinance 16-18, as amended.

City of Birmingham Ordinance 16-18, as amended, states:

> "It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition or performance of, or allow or permit the exhibition or performance of, distribute, or have in his possession with intent to distribute, exhibit, sell, or offer for sale any obscene matter in the City or the police jurisdiction thereof."

Found within Section 16-16 of this ordinance are definitions of words and terms which, for the purose of the ordinance, have the meanings ascribed to them by this section. "Obscene" is defined as follows:

> "To the average person, applying contemporary community standards, the work or matter taken as a whole, appeals to the prurient interests; the work or matter depicts or describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole lacks serious literary, artistic, political or scientific value."

The ordinance thus adopts the guidelines set out in *Miller v. California*, 413 U.S. 15 (1973), in its definition of "obscene."

"Sexual conduct" is defined in the ordinance as follows:

> "Any act of masturbation, excretory functions, homosexuality, sadomasocistic abuse, *nudity*, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or if such a person be a female, breasts, *whether or not any such conduct is actual or simulated and lewd exhibition of the genitals.*" (Emphasis added).
>
> "Nudity is defined in said ordinance as:
>
> "The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breasts with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state."

It is petitioner's contention that the City of Birmingham, through its Vice Squad in the Police Department, exercises prosecutorial discretion in selecting the defendants it will prosecute under this ordinance.

It is a well settled proposition that the Equal Protection Clause of the Fourteenth Amendment prohibits discriminatory enforcement of a law by administrative or executive officials. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In *Yick Wo* this Court stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. at pp. 373-374.

The rationale of *Yick Wo* applies equally to the enforcement of a city's municipal laws. In *Marguia v. Municipal Court for Bakersfield*, 124 Cal. Reptr. 204, 540 P.2d 44 (1975), the California Supreme Court was confronted with Defendants

charged with violations of municipal laws. Citing *Two Guys v. McGinley*, 366 U.S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961), and *Oyler v. Boyles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), the California Court declared:

> "the Court explicitly recognized both that the Constitutional protection against discriminatory law enforcement applies to the enforcement of criminal statutes and that such discriminatory enforcement may be raised as a defense in the criminal proceedings themselves."

In *Simonetti v. City of Birmingham*, 55 Ala. App. 163, 314 So.2d 83 (1975) the Alabama Appellate Court also acknowledged that a Defendant may properly raise selective or discriminatory enforcement of a municipal ordinance as a defense. The Petitioner did this in the Trial Court and before the Appellate Court, alleging discriminatory enforcement of City of Birmingham Ordinance 16-18, as amended, against him and other adult theatre and adult book store employees in violation of the Equal Protection Clause of the *Fourteenth Amendment*. The Alabama Appellate Court, in *Starley v. City of Birmingham*, 377 So.2d 1131 (Ala.Crim.App.) *cert. denied*, 377 So.2d 1134 (Ala. 1979), *cert. denied*, 79-1476 (1980), states that "although no clear standards exist for the quantum or type of proof sufficient to illustrate discriminatory enforcement of a statute or municipal ordinance, three elements must generally be proved: (1) selectivity in enforcement, (2) selectivity that is intentional, and (3) selectivity based on some invidious or unjustifiable standard such as race, religion, or other arbitrary classification. Annot., 4 A.L.R.3d 404, 410 (1965); 13 Proof of Facts 2d Section 5 (1977), and authorities cited therein." The Alabama Court found that Petitioner did not meet his burden of proof in this regard. An examination of the facts, however, shows Petitioner *has* met his burden.

To prove deliberate, systematic, discriminatory application of law towards an individual, it must be shown that the application towards the individual is different from others within his class *or that the class is being discriminated against. Yick Wo v. Hopkins, supra; Marguia v. Municipal Court for Bakersfield, supra.*

The Petitioner is cognizant of the fact that nonenforcement of the statute in and of itself is not sufficient to establish discrimination, *Snowden v. Hughes*, 321 U.S. 1 64 S. Ct. 397, 88 L.Ed. 497 (1944), and that a heavy burden rests on the defendant to establish conscious, intentional discrimination. In meeting the burden this Court has said:

> "The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."
>
> "There must be something more – something which in effect amounts to an intentional violation of the essential principle of practical uniformity." *Sunday Lake Iron Co. v. Wakefield*, 247 U.S. 350, 353, 38 S. Ct. 495, 62 L. Ed. 1154 (1918).

When selective enforcement is designed to discriminate against the persons prosecuted without any intention to follow it up by general enforcement against others the boundaries of equal protection are crossed and violated. *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N.Y.S. 2d 128, 4 A.L.R. 3d 393 (1962).

Petitioner's proof offered in his case was uncontradicted and unmistakable with reference to his contention that he and others in his class (his class being "adult book store and adult threatre operators") are discriminated against by the City in its enforcement of City of Birmingham Ordinance 16-18, as amended. The Petitioner proved the elements set out in *Starley*. Still, the Alabama Court completely ignored the discrimination which admittedly exists in the City of Birmingham in the enforcement of its obscenity ordinance, even though it had before it as exhibits copies of the type publications being sold in non-adult business establishments in the City of Birmingham which clearly demonstrated presumptive violation of its obscenity ordinance.

(1) Selectivity in Enforcement: The uncontradicted evidence is that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult theatres and adult book stores. There were seven adult book stores in Birmingham which sold publications depicting or describing the sexual conduct defined in the city's obscenity ordinance and shown in the movie, "Honeypie" (T. 52, 89). These stores, and their employees, were subject to constant arrests for violation of City of Birmingham Ordinance 16-18, as amended. There were hundreds of drug stores, 7-11 stores, or other business establishments regularly selling publications depicting or describing the sexual conduct defined in the city's obscenity ordinance and the movie, "Honeypie" (T. 92). And yet *not one* of these operators or employees has *ever* been arrested or tried for violating this same ordinance. The arresting officer in this case swore that he knew the type of publications sold in the non-adult book stores and magazine stands; that those publications depict or describe simulated and/or explicit sexual activity, including the same sexual conduct shown in the film, "Honeypie". The stories in these magazines describe sexual intercourse, cunnilingus, fellatio, and bondage scenes (T. 88). The pictures in these magazines show nudes, the head of a man between the legs of a female and the genitals of both males and females clearly exposed (T. 89).

The arresting officer further testified that in addition to the five other adult theatres in the City of Birmingham, there were at least five theatres, generally described as family theatres, which sometimes exhibited films x-rated for their sexual content. The city prosecutes the adult theatre operators while the city permits these family movie theatres to show adult films without fear of prosecution.

(2) Selectivity that is Intentional: The testimony of the arresting officer convincingly demonstrates that the city's focus is only on adult bookstores and adult theatres and is both purposeful and intentional. The evidence shows a clear and unmistakable pattern of conduct by police officers of the City of Birmingham with reference to enforcing that city's obscenity

ordinance. Since its enactment in 1973, only owners or employees of theatres and bookstores classified as "adult" have been subjected to arrests under the city's obscenity ordinance. The arresting officer was sent by his immediate superior to view the film shown at the Tomkat Theatre for the purpose of obtaining a search warrant to seize the film and an arrest warrant to arrest the Petitioner. This officer, and those who worked with him, were aware of the type publications sold throughout the City of Birmingham in general patronage businesses and the movies shown throughout the City of Birmingham in so-called "family theatres." He knew of no theatre, adult or non-adult, which did not show obscene films from time to time (T. 85). Nevertheless, the city admits that it prosecuted only those stores or theatres knowingly selling of exhibiting obscene matter, showing actual acts (including penetration and bodily contact) as compared with simulated sexual acts where the individuals were nude and/or were in close proximity with the other but there was no penetration. The city admits giving a different classification to adult businesses as compared with non-adult businesses although both sell sexually oriented materials in presumptive viollation of the city's obscenity ordinance.

The city's obscenity ordinance was adopted by the governing body of the City of Birmingham in 1973, following the *Miller* decision. The ordinance's proscription is clear: obscene matter, sold or exhibited, described or depicted, actual or simulated, is unlawful. The ordinance is due to be enforced equally against all who violate it or not at all. Nevertheless, only employees of adult bookstores and adult theatres are arrested for selling sex publications or exhibiting sex films. The city admits it. The Alabama court says this is not discrimination.

Perhaps the Alabama Appellate Court associates pornography or obscenity only with graphic or pictorial illustrations of sexual conduct, rather than with written accounts of sexual activity. This is not an idea which this Court has embodied in its obscenity rulings. That is not what the ordinance itself proscribes. A completely verbal account, without photographs

or illustrations, falls within the *Miller* rules, if otherwise it meets the test of that doctrine. While the photographs in publications sold in non-adult business establishments generally depict simulated sexual activity, some depict explicit sexual activity in presumptive violation of the city's obscenity ordinance. If it is the city's intent to prosecute only for graphic depictions of explicit sexual activity, not for written accounts of explicit sexual activity, if it is its intention to prosecute only for explicit sexual activity, not for simulated sexual activity, if it is its intention to not prosecute for nudity or lewd exhibitions of the genitals, then the city should change its ordinance and specify, as *Miller* provides, the type sexual activity it will prosecute. "If it can't be done in this fashion, then it must not be done at all." *Simonetti, supra*, 55 Ala. App. at 177, 314 So.2d at 95.

(3) Selectivity Based on . . . Other Arbitrary Classfication: It is uncontradicted from the evidence that arrests in the City of Birmingham for violation of its obscenity ordinance were directed only against operators or employees of adult bookstores and adult theatres. If the sale or exhibition of materials which depict or describe sexual conduct, actual or simulated, is in presumptive violation of the city's obscenity ordinance, then an arbitrary classification is established when the city directs its prosecutorial efforts against one class (the adult theatre or bookstore) for presumptively violating its ordinance while ignoring another class (the non-adult theatre or bookstore) for presumptively violating the same ordinance. Discriminatory application of the law towards an individual is shown when the class to which he belongs is being discriminated against. *Yick Wo v. Hopkins, supra.*

The "quantum or type of proof" offered by the Petitioner to illustrate discriminatory enforcement of the city's obscenity ordinance against him compares favorably with the "quantum or type of proof" accepted by the Alabama Appellate Court in *Simonetti v. City of Birmingham, supra* and *Associated Industries of Alabama v. State*, 55 Ala. App. 217, 314 So.2d 879 (1975).

In this case:

1. The Petitioner was employed at the Tomkat Theatre, an adult theatre, and exhibited a movie entitled "Honeypie" to a police officer of the City of Birmingham in alleged violation of City of Birmingham Ordinance 16-18, as amended, for which he was arrested, tried and convicted.

2. There were numerous "family theatres" which exhibited films and bookstores, drug and convenience stores which sold magazines describing or depicting sexual conduct in presumptive violation of the city's obscenity ordinance.

3. No arrests were made by the City of Birmingham for films shown or publications sold other than in adult establishments.

In the case of *Simonetti v. City of Birmingham, supra*, the facts were:

1. Simonetti sold groceries on Sunday in alleged violation of the "blue laws" of the City of Birmingham, for which he was arrested, tried and convicted.

2. Although there were other business establishments open on Sunday selling their wares in alleged violation of the city's blue laws, none of their operators or employees were arrested.

In the case of *Associated Industries of Alabama v. State, supra*, the facts were:

1. Five domestic corporations, one domestic association, and five individuals were indicted by a special grand jury of Montgomery County, Alabama, for violating the State's Corupt Practices Law, and were arrested, tried and convicted.

2. Numerous other individuals and groups, engaged in similar political activities during this same period of time, were not indicted by the special grand jury, although they were well

known to the prosecution and were known to not have filed a statement of campaign expenditures with the Secretary of State, the charge for which the others were arrested, tried and convicted.

Simonetti and *Associated Industries*, both decided in 1975 by the Alabama Court, cited the following in support of its finding that there was discriminatory enforcement of the penal law involved in each case.

1. "In *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Supreme Court said:

> 'Though the law itself be fair on its face, and impartial in appearance, yet, it if be applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.' " *Simonetti, supra*, 53Ala.App. at page 173, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala. App. at page 288, 314 So.2d at 889.

2. "In *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Supreme Court said:

> 'A law non-discriminatory on its face may be grossly discriminatory in its operation.' " *Simonetti, supra*, 53 Ala. App. at 173, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at 289, 314 So.2d at 890.

3. "In *East Coast Lumber Terminal v. Town of Babylon*, Cir. 174 F.2d 106, Judge Learned Hand wrote:

> 'It has indeed been the law for over sixty years that the (14th) Amendment covers the unequal enforcement of valid laws, as well as any enforcement of invalid powers.' *Yick Wo v. Hopkins, supra.*"

Simonetti, supra, 53 Ala. App. at page 173, 314 So.2d. at 92; *Associated Industries, supra*, 55 Ala. App. at page 289, 314 So.2d at 889.

4. "In *Sunday Lake Iron Company v. Wakefield*, 247 U.S. 350-352, 38 S.Ct. 495, 62 L.Ed. 1154, this Court said:

> 'The purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute *or by its improper execution through duly constituted agents.*' " (Emphasis added). *Simonetti, supra*, 53 Ala.App. at page 174, 314 So.2d at 92; *Associated Industries, supra*, 55 Ala.App. at page 289, 314 So.2d at 890.

5. In *Simonetti, supra*, 53 Ala. App. at page 175, 314 So.3d at 93; this same Alabama Appellate Court said:

> "Police officers are sworn to uphold and enforce all laws within their jurisdiction . . . they permitted businesses in direct competition with appellant to remain open for business . . . and, thereby, go unwhipped of justice while hauling appellant into court to be fined and incarcerated.
>
> " . . . We find no trouble in concluding that appellant's constitutional rights under the Equal Protection Clause of the Fourteenth Amendment have been blatantly violated and that his arrest and conviction were brought about by invidious discrimination in the unequal enforcement of the . . . laws of the City of Birmingham. To allow this conviction to stand would be a grave miscarriage of justice and would be wrong and unjust."

6. In *Simonetti, supra*, 53 Ala.App. at 177, 314 So.2d at 95, cited in *Associated Industries, supra*, 55 Ala.App. at 289, 314 So.2d at 890, the Alabama Court said:

> "We believe that if the law, all laws, is *enforced equally* and *justice is dispensed with an even hand*, and on a non-discriminatory basis, all citizens will maintain a high regard and a lofty respect for our Court system as administered under the Constitution. If it can't be done in this fashion, then it must not be done at all."

In *Simonetti, supra*, 55 Ala.App. at 172, 314 So.2d at 90, the Alabama Court quotes Federal District Court Judge Sam Pointer in discussing the question of burden in *John F. Lawhon Furniture Company v. Melvin Bailey*, (D.C. Ala. CA 72-1109):

> "The question then becomes, in order to make out the case, *must the plaintiff prove intentional sort of malicious discrimination and enforcement, or is it sufficient if the plaintiff proves that whatever the reason or justification, nevertheless in actual fact it works out unequally and invidiously toward him or it. I think it is the latter.* And if the Sheriff's Department, as I'm convinced under the evidence, cannot fully enforce this type of law throughout the entire county on a completely equal basis, then it should not be permitted to let its forces be directed as against one particular company in effect unequally, that is what it turns out to be, and again not from any intent to harm, but simply as the sheer result of the fact that there are other items, much more important that the Sheriff's Department could be doing ultimately than dealing with the victimless crime involving a number of its patrol cars in this type of investigative work. ****Either you have got to do it more equally than you have done... or not do it.*" (Emphasis added)

The city's obscenity ordinance has been enforced only against owner, operators or employees of adult business establishments. The testimony in this case verifies this. There is no claim that the law cannot be enforced equally against all who violate it. It is a matter of choice. If the city has the time and

the manpower to arrest the same employees of the same adult businesses time and time again, surely it can find the time and manpower to arrest employees of business establishments classified as nonadult but which nevertheless sell publications or exhibit movies which describe or depict sexual conduct in presumptive violation of its obscenity ordinance.

Petitioner is not seeking protection from the law. He merely asks to be afforded the same protection of the law as are murderers, rapists, drug peddlers, "blue law" violators, those who violate the State's Corrupt Practices Law, and employees of the nonadult business establishments which sell adult materials.

3. It is Petitioner's contention that it is a flagrant violation of the Fourteenth Amendment to the United States Constitution for a State trial court to follow a practice of imposing a heavier sentence upon any defendant for exercising his right to a trial by jury. Petitioner recognizes that a trial *de novo* is a new trial where the slate is wiped clean. *Guin v. City of Tuscaloosa*, 21 Ala.App. 61, 106 So. 64, *cert. denied*, 213 Ala. 685, 106 So. 67 (1925). The Circuit Judge can also impose a sentence which is greater than the sentence given by a Municipal Court Judge since the trial is a new one. *Clark v. City of Mobile*, 357 So.2d 675 (Ala.App. 1978).[1] However, the Circuit Judge cannot impose a greater sentence as punishment against petitioner for exercising his right to a trial by jury. *Blackledge v. Perry*, 417 U.S. 21 (1974), *Colten v. Kentucky*, 407 U.S. 104 (1972), *North Carolina v. Pearce*, 395 U.S. 711 (1969).

The Petitioner quotes extensively from *North Carolina v. Pearce, supra*, in support of this contention. In *Pearce*, beginning at page 427, the Court says:

> "Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitu-

[1] See *State v. Eaden*, attached hereto as Appendix D at page A. 11.

tional right, 'would be patently unconstitutional.' *United States v. Jackson*, 390 U.S. 570, 581. And the very threat inherent in the existence of such a punitive policy would with respect to those still in prison, serve to 'chill the exercise of basic constitutional rights.' *Id.*, at 582. See also *Griffin v. California*, 380 U.S. 609, *cf. Johnson v. Avery*, 393 U.S. 483. *But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.* 'A new sentence with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant.' *Nichols v. United States*, 106 F. 672, 679. A court is 'without right to . . . put a price on an appeal. *A defendant's exercise of a right of appeal must be free and unfettered . . .* [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemna of making an unfree choice.' *Worcester v. Commissioner*, 370 F.2d 713, 718. See *Short v. United States*, 120 U.S. App. D.C. 165, 167 344 F.2d 550, 552. 'This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353, *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487.' *Rinaldi v. Yeager*, 384 U.S. 305, 310-311.

"Due process of law then requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, *due process*

also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

"In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons *must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (Emphasis added).

In *Blackledge v. Perry, supra*, beginning at page 21, the Court reaffirms its holding in *Pearce* that it is the fear of vindictiveness, not necessarily the existence of actual retaliatory motivation, that may unconstitutionally deter a defendant's exercise of his right to appeal. The Court, through Justice Stewart, says:

"The lesson that emerges from *Pearce, Colten,* and *Chaffin* is that *the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'* Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

"A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial de novo in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial.

"There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the Pearce case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that *'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retailiatory motivation on the part of the sentencing judge.'* 395 U.S., at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprenhension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration. cf *United States v. Jackson*, 390 U.S. 570." (Emphasis added)

A defendant who, by trial de novo, appeals his case to the Circuit Court is faced with the choice of either plea bargaining,

trying his case without a jury, or if tried to a jury and found guilty, facing the almost certain prospect of receiving from the Court a jail sentence or a more severe jail sentence than the jail sentence imposed in the Municipal Court, regardless of the amount of the fine set by the jury. A compilation of all 316 cases appealed from the Municipal Court of Birmingham to the Circuit Court of Jefferson County, Alabama, Tenth Judicial Circuit and heard by the Honorable Judge William Cole during the period from September 21, 1977 to September 21, 1978, was presented as evidence by appellant to the Circuit Court during the hearing on his Motion for the Reduction of Jail Sentence (T. 134-167). The evidence was received and marked by the trial court (T. 159), and is attached hereto as Appendix E at A. 13.

The appellate court ruled that "the evidence and figures introduced by the defendant do not support his contention." And yet the evidence and figures introduced by the Petitioner clearly show that defendants who seek a jury trial and are found guilty, will receive some form of jail sentence while those who do not seek a jury trial, who either plea-bargain or try their case before the judge without a jury and found guilty, will receive a sentence comparable or less severe to the sentence he received in municipal court. And if the case involves prostitution or pornography, and the jury finds the defendant guilty, the defendant will receive an even more severe jail sentence. Judge Cole admits this on page 146 of the trial transcript.

The appellate court further stated that "it is clear that the sentence the defendant received in the municipal court was immaterial and not considered by the circuit judge in imposing punishment." It may be true that the trial judge may not consider the sentence each defendant receives in municipal court when imposing punishment after conviction in the circuit court. However, with his experience in hearing all appeal cases from the municipal court, the trial judge doesn't have to look at the lower court's sentence. He knows what it is in most cases. In any event, his sentence for obscenity convictions is predetermined: *the maximum*, regardless of the evidence, the subject

matter, or the record of the defendant. A defendant convicted of murder has a better chance of probation in the trial court than a person convicted of violating City Ordinance 16-18, as amended. The result being that Petitioner, a first offender in Judge Cole's court (T. 145-146), an employed union projectionist of 37 years assigned to this job by his union, will go to jail for showing a movie which unsolicited adults want to and paid money to see. And, if his conviction stands, he will be incarcerated in the city jail for five months longer than he would have had to serve, had he not exercised his right to appeal. The jury did not impose the jail sentence given this Petitioner. The trial court did because the Petitioner did not plea-bargain nor try his case before the court without a jury. In the spirit of *Pearce* and *Perry* this was and is wrong.

CONCLUSION

For foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Alabama Court of Criminal Appeals.

Respectfully submitted,

FERRIS S. RITCHEY, JR.

Attorney for Petitioner

APPENDIX A

Walter W. HOWELL

v.

CITY OF BIRMINGHAM.

6 Civ. 916.

Court of Criminal Appeals of Alabama

Jan. 22, 1980

Rehearing Denied Feb. 26, 1980.

BOWEN, Judge.

This is an obscenity case involving the exhibition of a movie entitled "Honeypie" in violation of Birmingham City Ordinance 16–18 as amended.

The defendant was employed as a clerk and movie projectionist at the Tomkat Theatre in Jefferson County. He was tried and convicted in Municipal Court. He appealed to the Circuit Court, was tried by a jury and fined five hundred dollars. The trial judge imposed a sentence of 180 days hard labor.

I

In *Holderfield v. City of Birmingham,* Ala.Cr.App., 380 So.2d 990, (1979), this Court held that a jury trial is not constitutionally required for an obscenity prosecution in the municipal court.

II

As in *Starley v. City of Birmingham,* Ala.Cr.App., 377 So.2d 1131 (1979), and *Holderfield*, supra, there is no evidence that Birmingham City Ordinance 16–18 as amended has been intentionally and selectively enforced in violation of the equal protection clause of the Fourteenth Amendment.

III

The defendant allegs that the cumulative effect of prejudicial statements by the trial court and the prosecutor in reference to the film denied him a fair and impartial trial.

During the voir dire examination of the jury venire, the prosecutor inquired:

> "Do you realize that you have the duty to serve on this jury if you are so selected even though the subject matter is unpleasant, degrading of the love act and degrading of the actors?"
>
> * * * * * *
>
> ". . .–assuming that you find the subject matter to be projected on that screen, to be unpleasant, degrading of the love act and degrading to the actors, would you still be able to sit on this case, take the evidence, take the law as Judge Cole will give it to you and reach an unbiased verdict based on the evidence and the law in this case?"

Also, the trial judge stated:

> "Just because this movie which somebody is going to see, twelve of you, is distasteful, just because you may not approve of it, that is no reason nor am I excusing anyone for that reason."
>
> * * * * * *

"But those are the two criteria, can you base your verdict in this case on what the law is absolutely and on what the evidence is absolutely."

In *Starley*, supra, this Court addressed a similar issue:

"During the voir dire examination of the venire, the trial judge, in response to a venireman's doubt that he could not view the evidence fairly and impartially, instructed the venire that many cases contain revolting evidence which may result in a jury having unpleasant jobs, duties, and responsibilities. Furthermore, he stated that each juror would be applying contemporary community standards when viewing the magazine and that each one would not be asked to apply his or her personal opinion to it. The appellant did not object to this instruction.

"We find that the trial judge did not commit error in instructing the venire as to the possible unpleasantness of their job."

In *Brown v. State*, 48 Ala.App. 304, 307, 264 So.2d 529, 531, reversed on other grounds, 288 Ala. 680, 264 So.2d 549 (1971), this Court held that the trial court's use of the phrase "regardless of how nauseating the evidence may be" while qualifying a jury with respect to the death penalty did not constitute error.

Probable prejudice for any reason disqualifies a prospective juror. *Grandquest v. Williams*, 273 Ala. 140, 135 So.2d 391 (1961). The trial court has a duty to ascertain whether jurors called for trial are subject to disqualification. *Folkes v. State*, 17 Ala.App. 119, So.567 (1919); Alabama Code (1975), Section 12–16–150. Alabama criminal trial procedure dictates that the prosecution, as well as the defense, has "the right to examine jurors as to their qualifications, interest, or bias that would affect the trial of the case". See Title 30, Section 52, Code of Alabama 1940. For these reasons, the remarks of the trial judge and the prosecutor were not error.

We have carefully examined the comments by the prosecutor in his closing argument which the defendant finds objectionable. They do not constitute reversible error. The trial judge overruled the objections and instructed the jury, in effect, that counsel are allowed to comment upon the reasonable inferences to be drawn from the evidence. A prosecutor "may comment on proper inferences which may be drawn from the evidence and may draw conclusions from the evidence based on his own reasoning". *Andrews v. State*, 359 So.2d 1172, 1178 (Ala.Cr.App. 1978).

IV

The defendant was originally convicted in municipal court, fined two hundred and fifty dollars and sentenced to thirty days' imprisonment. He appealed his conviction to the circuit court and demanded a trial by jury. The jury found the defendant guilty and imposed the maximum fine of five hundred dollars. The circuit judge then imposed one hundred eighty days' imprisonment as additional punishment upon the defendant. The defendant contends that the circuit judge imposed a greater sentence because he exercised his right to a trial by jury.

From the record, it is clear that the sentence the defendant received in the municipal court was immaterial and not considered by the circuit judge in imposing punishment. The evidence and figures introduced by the defendant do not support his contention. There was no unconstitutional "price" placed on the defendant's demand for a jury trial on appeal from the municipal court. We find no violation of the letter or spirit of *Blackledge v. Perry*, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974); *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). See *Clark v. City of Mobile*, 357 So.2d 675 (Ala.Cr.App.), cert. denied, 357 So.2d 680 (Ala.1978).

At the hearing on the defendant's motion for reduction of jail sentence, the trial judge described the film as "terrible. . . horrible. . . just the filthiest film I have ever seen. . . nauseating– Well, it almost made me regurgitate it was so terrible". We have searched the record as required by law for error prejudicial to the defendant. Finding none, we affirm the judgment of the Circuit Court.

AFFIRMED.

All Judges concur.

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

Circuit Ct. #CC 78 01010

6th Div. 916, JEFFERSON Circuit Court

WALTER W. HOWELL

vs Appellant

CITY OF BIRMINGHAM

Appellee

Dear Sir: This is to advise you that on FEB 26 1980, the Court of Criminal Appeals announced decision of:

application for rehearing overruled) No opinion

Yours truly,

in the above stated case. MOLLIE JORDAN, CLERK

APPENDIX B

Ex parte Walter W. HOWELL.

In re Walter W. HOWELL

v.

CITY OF BIRMINGHAM.

79-417.

Supreme Court of Alabama.

May 23, 1980.

Certiorari to the Court of Criminal Appeals.

EMBRY, Justice.

WRIT DENIED—NO OPINION.

TORBERT, C. J., and FAULKNER, JONES and ALMON, JJ., concur.

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law. . ., abridging the freedom of speech, or of the press. . . ."

2. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

3. The pertinent provisions of the Fourteenth Amendment are:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

4. Ala. Const. Art. I § 5 states:

"That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."

5. Ala. Code § 12-14-6 (1975) states:

"All cases in municipal courts shall be tried by a judge without a jury."

6. City of Birmingham ORDINANCE, Sections 16-16 and 16-18 provide:

"AN ORDINANCE TO AMEND ARTICLE II OF CHAPTER 16 OF THE GENERAL CODE OF THE CITY OF BIRMINGHAM, 1964, AS AMENDED.

BE IT ORDAINED by the Council of the City of Birmingham, as follows:

SECTION I. That Article II of Chapter 16 of the General Code of the City of Birmingham, 1964, be and is hereby amended to read as follows:

Article II. OBSCENITY.

Sec. 16-16. Definitions.

The following words and terms, when used in this article, shall for the purpose of this article have the meanings respectively ascribed to them by this section:

Distribute. To transfer possession of, whether with or without consideration.

Knowingly. Having actual or constructive knowledge of the character and content of the subject matter. A person has constructive knowledge if a reasonable inspection under the circumstances would disclose the nature of the subject matter and the failure to inspect is for the purpose of avoiding such disclosure.

Nudity. The showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple or the depiction of covered male genitals in a discernibly turgid state.

Obscene. To the average person, applying contemporary community standards, the work or matter, taken as a whole, appeals to the prurient interest; the work or matter depicts or

describes, in a patently offensive way, sexual conduct; and the work or matter, taken as a whole, lacks serious literary, artistic, political or scientific value.

Sadomasochistic abuse. Flagellation or torture by or upon a person undressed or clad in undergarments, mask or bizarre costume or the condition of being fettered, bound or otherwise physically restrained on the part of one undressed or so clothed.

Sexual conduct. Any act of masturbation, excretory functions, homosexuality, sadomasochistic abuse, nudity, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such a person be a female, breast, whether or not any such conduct is actual or simulated and lewd exhibition of the genitals.

Work or Matter. Any book, magazine, newspaper or other printed or written material, performance of any picture, drawing, photograph, motion picture or other pictorial representation or any statue, figure of any recording transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

Sec. 16-18. Publishing, printing, etc., prohibited.

It shall be unlawful for any person to knowingly publish, print, exhibit, participate in the exhibition or performance of, or allow or permit the exhibition or performance of, distribute, or have in his possession with intent to distribute, exhibit, sell or offer for sale any obscene matter in the city or the police jurisdiction thereof."

7. **Title 28, U.S.C. §1257(3)**

§1257. State Courts: appeal; certiorari

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

". . .(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

APPENDIX D

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[1] *State v. Eaden*, 25 Crim.L.Rep (BNA) 2412 (W. Va. 1979)

On July 10, 1979, the West Virginia Supreme Court of Appeals in *State v. Eaden*, 25 Cr.L. 2412 imposed a blanket rule for that state establishing the sentence a defendant receives at his first trial as the maximum he may be given upon reconviction after an appeal de novo. West Virginia followed the recommendation of the Advisory Committee on Sentencing and Review of the ABA. There the Court said:

> ". . . it is clear to us that when a defendant refuses to prosecute an appeal to which he is entitled by law for fear he will receive a heavier sentence on retrial, he has been denied his right to appeal.
>
> ". . . increased sentencing upon reconviction after successful prosecution of an appeal inherently gives rise to a fear of harsher penalties and retribution which burdens or chills the defendant's right to appeal and should not be permitted in any circumstances.
>
> ". . . the Advisory Committe thought it best 'to establish a standard that is prophylactic in effect and easily administered, whereby sentencing judges are not given power to increase a sentence when an applicant has exercised his right to seek a post-conviction remedy.' Moreover, appellate courts should not be burdened with the unpleasant task of assessing a trial court's sincerity."
>
> . . .
>
> "The opportunity for vindictive sentencing is inherent in any system which permits increased sentencing upon conviction at a new trial. And even

if vindictiveness can be positively shown not to exist, the deterent effect of increased sentencing on the exercise of the right to obtain a new trial deprives a defendant of his statutory right to a trial de novo, his only avenue of post-conviction relief, in the same way it deprives a defendant desiring to attack his conviction of his right to appeal. We can see no justification for distinguishing between the burden placed on the defendant's rights in either instance."

"Accordingly, . . . a defendant who is convicted of an offense in a trial before the justice of the peace and exercises his statutory right to obtain a trial de novo in the circuit court is denied due process when, upon conviction at his second trial, the sentencing judge imposes a heavier penalty than the original sentence."

APPENDIX E

EVIDENCE RECEIVED BY TRIAL COURT ON MOTION FOR REDUCTION OF JAIL SENTENCE

1. Out of 316 cases appealed to this Court from the Municipal Court of Birmingham, 62 of those cases were either nol prossed, the appeal was dismissed, or were continued, leaving 254 cases.

2. Of the 254 cases, 43 were jury trial representing 30 different defendants.

3. Since some cases were consolidated, there were actually 30 trials during this period.

4. Of the 43 cases tried to a jury, there were 18 guilty verdicts and 25 not guilty verdicts.

5. The 18 guilty verdicts listed by case number are found on page 138 of the transcript.

6. The 18 guilty verdicts consisted of charges including prostitution, malicious injury to property, assault and battery, disorderly conduct, driving without a license, DWI, public drunk, and assaulting a police offer. (None of these cases were obscenity cases handled by Defense Attorney.)

7. In 14 of the 18 cases, the fine imposed by the jury was less than the fine imposed in the Municipal Court. Nevertheless, in 7 of those 14 cases, Judge Cole imposed a jail sentence of from thirty days to one hundred-eighty days. For example:

A. Case - 77-01971, a prostitution case – Municipal Court verdict was $200 fine and 30 day jail sentence, the jury verdict was a $35 fine. The Circuit Judge ADDED 180 days.

B. Case - 77-02159, another prostitution case – Municipal Court verdict was $200 and 15 days, the jury verdict was $35. The Circuit Judge ADDED 90 days.

C. Case - 77-02163, a malicious injury to property case – Municipal Court verdict was $150 fine, the jury verdict was $200. The Circuit Judge ADDED 180 days.

D. Case - 77-02168, an assault and battery case – Municipal Court verdict was $100 fine and 30 days suspended, the jury verdict was $120 fine. The Circuit Judge ADDED 30 days but did not suspend it.

E. Case - 78-00033, disorderly conduct case – Municipal Court fine was $200 and 120 days. The jury verdict was a $10 fine. The Circuit Judge ADDED 30 days.

F. Case - 78-00574 - DWI case – Municipal Court fine was $200 and 15 days. The Court record shows that by consent the Defendant agreed to pay a $200 fine, take a 15 day suspension and one year probation. But the Defendant later withdrew his plea. The jury verdict was a fine of $125. The Circuit Judge ADDED 30 days.

8. Of 193 consent cases:

A. 152 defendants who plea bargained received less severe or more favorable sentences in Judge Cole's court than they received in the Municipal Court.

B. Ten received a more severe sentence in the form of a suspended sentence or probation, i.e., if the Municipal Court assessed a $100 fine, Judge Cole would agree to the same $100 fine but add 15 days suspended or place the

defendant on six month's or one year's probation. There is not one instance in these consent cases where the defendant received a jail sentence he had to serve in addition to the fine imposed.

C. 31 received the same fine as received in the Municipal Court.

9. Eighteen cases were tried by the Court without a jury, of these:

A. Three received the same money fine (no days).

B. Eleven received a smaller fine (no days).

C. One was dismissed.

D. Three received a more severe sentence.

10. In two prostitution cases where it appears it was the defendant's first offense in his court, and the jury trial was waived, no days were added by the Circuit Court Judge.